

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

IN RE: NEW ENGLAND COMPOUNDING  
PHARMACY, INC. PRODUCTS LIABILITY  
LITIGATION

MDL No. 2419  
Master Dkt. 1:13-md-02419-RWZ

THIS DOCUMENT RELATES TO:

Cox, No. 1:13-cv-12918;  
Dingess, No. 1:13-cv-12490;  
Hubbard, No. 1:13-cv-12922;  
Jackson, No. 1:13-cv-12923;  
Johnson, No. 1:13-cv-12915;  
Lapiska, No. 1:13-cv-12914;  
Nealon, No. 1:13-cv-12491;  
Norris, No. 1:13-cv-12682;  
Palmer, No. 1:13-cv-12688;  
Reed, No. 1:13-cv-12917

**PLAINTIFFS' STEERING COMMITTEE'S RESPONSE TO THE SSC DEFENDANTS'  
MOTION FOR DISCRETIONARY COSTS**

The Plaintiffs' Steering Committee hereby files this Response to the Specialty Surgery Center Defendants' Motion for Assessment of Litigation Costs [Dkt. No. 3247, the "Motion"]. This Motion presumably seeks an assessment of discretionary costs in the ten cases dismissed by this Court's November 17, 2016 order [Dkt. No. 3188, the "Dismissal Order"]. The PSC maintains that this motion is premature for the following reasons:

1. At this time it is not clear that this Dismissal Order is final as to all ten cases, as some cases clearly intend to seek an appeal of this order.<sup>1</sup> The Court had not yet entered judgment in the individual matters until after the SSC Defendants filed the current motion, meaning that the plaintiffs affected by the Court's Dismissal Order are still within their time to file an appeal or to move for reconsideration under Rule 59(c).

Moreover, there are several cases still pending in this MDL against the SSC Defendants

---

<sup>1</sup> See Dkt. No. 3235.

that are not subject to the Dismissal Order but could be impacted by the Court granting the Motion. It appears the prevailing rule in this District is that motions for discretionary costs should be filed “within fifteen (15) days of the earlier of (i) the expiration of the time allowed for appeal of the final judgment or decree, or (ii) receipt by the Clerk of the Mandate of the Court of Appeals.”<sup>2</sup> Obviously the award of costs cannot and should not be determined until matters are fully resolved on appeal or the time for seeking such an appeal has run. This is not the procedural posture of this case or this MDL, and therefore the SSC Defendants’ Motion is premature.

2. The SSC Defendants’ Motion does not contain any information as to how it proposes to allocate costs, the amount of the costs which they seek, or the supporting documentation necessary to evaluate the request. Without such information (which the SSC Defendants claim is forthcoming), the PSC cannot determine the appropriateness or the adequacy of the Motion.

As a result, the PSC respectfully requests that it be permitted to file an opposition<sup>3</sup> to the Motion when the Motion is procedurally ripe and after the SSC Defendants supplement the Motion with the amount of discretionary costs which they seek.

Dated: January 18, 2017

Respectfully Submitted,

/s/ Benjamin A. Gastel

---

<sup>2</sup> See *Taxation of Costs*, U.S. District Court for the District of Massachusetts (Jan. 18, 2017), available at <http://www.mad.uscourts.gov/resources/pdf/taxation.pdf>.

<sup>3</sup> The PSC anticipates opposing the Motion, amongst other reasons, to the extent that it seeks to allocate any “common” costs to the cases dismissed as part of the Dismissal Order. Further, to the extent that the Motion seeks to allocate such “common” costs, the PSC anticipates objecting on the grounds that the motion is not procedurally ripe since numerous cases against the SSC Defendants remain pending in the MDL.

J. Gerard Stranch, IV  
Benjamin A. Gastel  
BRANSTETTER, STRANCH &  
JENNINGS, PLLC  
223 Rosa L. Parks Ave., Suite 200  
Nashville, TN 37203  
Telephone: 615/254-8801  
Facsimile: 615/255-5419  
[gerards@bsjfirm.com](mailto:gerards@bsjfirm.com)  
[beng@bsjfirm.com](mailto:beng@bsjfirm.com)

*Plaintiffs' Steering Committee and TN Chair*

Thomas M. Sobol  
Kristen Johnson Parker  
HAGENS BERMAN SOBOL SHAPIRO, LLP  
55 Cambridge Parkway, Suite 301  
Cambridge, MA 02142  
Telephone: 617/482-3700  
Facsimile: 617/482-3003  
[tom@hbsslaw.com](mailto:tom@hbsslaw.com)  
[kristenjp@hbsslaw.com](mailto:kristenjp@hbsslaw.com)

*Plaintiffs' Lead Counsel*

Elizabeth J. Cabraser  
Mark P. Chalos  
LIEFF CABRASER, HEIMANN & BERNSTEIN, LLP  
275 Battery Street, 29<sup>th</sup> Floor  
San Francisco, CA 94111  
Telephone: 415/956-1000  
Facsimile: 415/956-1008  
[ecabraser@lchb.com](mailto:ecabraser@lchb.com)  
[mchalos@lchb.com](mailto:mchalos@lchb.com)

*Federal/State Liaison*

Marc E. Lipton  
LIPTON LAW  
18930 W. 10 Mile Road  
Southfield, MI 48075  
Telephone: 248/557-1688  
Facsimile: 248/557-6344  
[marc@liptonlaw.com](mailto:marc@liptonlaw.com)

Kimberly A. Dougherty  
JANET, JENNER & SUGGS, LLC  
31 St. James Avenue, Suite 365  
Boston, MA 02116  
Telephone: 617/933-1265  
[kdougherty@myadvocates.com](mailto:kdougherty@myadvocates.com)

Mark Zamora  
ZAMORA FIRM  
6 Concourse Parkway, 22<sup>nd</sup> Floor  
Atlanta, GA 30328  
Telephone: 404/451-7781  
Facsimile: 404/506-9223  
[mark@markzamora.com](mailto:mark@markzamora.com)

Patrick T. Fennell (VSB 40393)  
CRANDALL & KATT  
366 Elm Avenue, S.W.  
Roanoke, VA 24016  
Telephone: 540/342-2000  
Facsimile: 540/400-0616  
[pfennell@crandalllaw.com](mailto:pfennell@crandalllaw.com)

*Plaintiffs' Steering Committee*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 18, 2017, a true and exact copy of the foregoing was served upon all counsel of record via the courts electronic mail.

**/s/ Benjamin A. Gastel**

Benjamin A. Gastel